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## ARGENTINA – MEASURES RELATING TO TRADE IN GOODS AND SERVICES

### NOTIFICATION OF AN APPEAL BY PANAMA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 27 October 2015, from the delegation of Panama, is being circulated to Members.

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Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20(1) of the Working Procedures for Appellate Review, Panama hereby notifies its decision to appeal certain issues of law covered in the Panel Report in *Argentina – Measures relating to Trade in Goods and Services* (WT/DS453/R), which was circulated on 30 September 2015 (Panel Report). Pursuant to Rule 21(1) of the Working Procedures for Appellate Review, Panama is simultaneously filing this Notice of Appeal and its Appellant's Submission with the Appellate Body Secretariat.

Panama seeks review by the Appellate Body of the following errors of law contained in the Panel Report:

- i. The Panel erred in interpreting and applying the term "treatment no less favourable" in the context of Articles II:1 and XVII of the General Agreement on Trade in Services (GATS)

The Panel interpreted the term "treatment no less favourable" in Articles II:1 and XVII of the GATS as permitting the consideration of "regulatory aspects" in the assessment of whether a measure modifies the conditions of competition in the relevant marketplace. The Panel considered that the relevant "regulatory aspect" in this dispute was whether Argentina has access to tax information on foreign suppliers. The Panel also considered that this regulatory aspect provides a competitive advantage to services and service suppliers of countries that do not exchange tax information with Argentina.

In essence, the Panel considered that when a Member imposes higher tax burdens or additional administrative requirements only on services or service suppliers of certain origin in order to neutralize a competitive advantage, that Member is not modifying the conditions of competition in the marketplace and, therefore, is not acting in a manner inconsistent with its obligations under Articles II:1 and XVII of the GATS to provide "treatment no less favourable".

The Panel's interpretation is inconsistent with established jurisprudence regarding the meaning of "treatment no less favourable" in these provisions and establishes a new legal standard that has no proper basis in either the text or context of Articles II:1 or XVII of the GATS, or in the object and purpose of these provisions or of the GATS itself.

Without prejudice to Panama's ability to refer to other paragraphs in the Panel Report, the Panel's incorrect interpretation is contained in paragraphs 7.212, 7.232, and 7.215 (for Article II:1 of

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the GATS<sup>1</sup>), as well as in paragraphs 7.490-7.494, 7.514-7.516, and 7.520-7.521 (for Article XVII of the GATS<sup>2</sup>) of the Report.

- ii. The Panel erred in applying the terms "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement" within the meaning of Article XIV(c) of the GATS to the facts of the case

Having found that measures 1, 2, 3, 4, 7, and 8 (as defined in paragraphs 2.13-2.22 and 2.37-2.40 of the Panel Report) were inconsistent with Article II:1 of the GATS, the Panel had to address Argentina's defences under Article XIV(c) of the GATS in the light of the well-developed legal standards for panels addressing defences raised under the exceptions contained in Article XX of the GATT 1994 and Article XIV of the GATS.

In this case, Panama considers that the Panel failed to apply properly the relevant legal standard for an Article XIV(c) defence to the measures before it. In particular, the Panel failed to focus its analysis on the aspects of measures 1, 2, 3, 4, 7, and 8 that were found to accord less favourable treatment within the meaning of Article II:1 of the GATS to like services and service suppliers of non-cooperative countries.

Furthermore, the Panel focused its analysis on the question of whether the measures at issue secure compliance with the objectives of the relevant laws and regulations, and not on whether they secure compliance with the specific provisions of those laws and regulations referred to by Argentina.

In addition, the Panel erred in finding that Argentina had demonstrated that measures 1, 2, 3, 4, 7, and 8 were "designed" and are "necessary" to secure compliance with the relevant laws and regulations within the meaning of Article XIV(c) of the GATS. In particular:

- a. the Panel failed to conduct a proper analysis of the contribution of measures 1, 2, 3, 4, 7, and 8 to the objective of securing compliance with the relevant laws and regulations; and
- b. the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 have a limited trade-restrictive effect on international trade in services.

For these reasons, the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 were provisionally justified under Article XIV(c) of the GATS.

Without prejudice to Panama's ability to refer to other paragraphs in the Panel Report, the Panel's incorrect application of the relevant legal standard is contained in section 7.3.5.2 of the Panel Report, in particular, in paragraphs 7.637-7.642, 7.646-7.648, 7.692, 7.695, 7.700, 7.703, 7.705, 7.706-7.717, 7.720-7.728, and 7.737-7.740.

- iii. The Panel erred in interpreting the scope of paragraph 2(a) of the GATS Annex on Financial Services, which is entitled "Domestic Regulation"

Having found measures 5 and 6 (as defined in paragraphs 2.23-2.36 of the Panel Report) to be GATS-inconsistent, the Panel was called upon to interpret paragraph 2(a) of the GATS Annex on Financial Services (prudential exception) and to determine whether Argentina had met its burden of establishing that measures 5 and 6 were justified under that provision.

In doing so, the Panel failed to interpret the scope of the prudential exception correctly. In particular, the Panel failed to give effect to the term "domestic regulation" in the title of the prudential exception, which determines the scope of this exception. The Panel incorrectly concluded that the prudential exception covers all types of measures affecting the supply of financial services and not only those measures that can be characterized as "domestic regulations".

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<sup>1</sup> The Panel applied its incorrect interpretation in paragraphs 7.283-7.293, 7.300-7.302, 7.309-7.310, 7.319-7.320, 7.329-7.330, 7.339-7.340, 7.351-7.352, and 7.360-7.361 of the Report.

<sup>2</sup> The Panel applied its incorrect interpretation in paragraphs 7.500-7.525 of the Report.

Without prejudice to Panama's ability to refer to other paragraphs in the Panel Report, the Panel's finding reflecting its incorrect interpretation is contained in paragraph 7.847 of the Report.

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